

LENORE SALOIS
v.
AREA DIRECTOR, BILLINGS AREA OFFICE

IBIA 81-3-A

Decided May 15, 1981

Appeal from decision by Area Director, Billings Area Office, Bureau of Indian Affairs, holding that removal of a tribal court judge on the Blackfeet Reservation constitutes a tribal action unreviewable by the Bureau under the provisions of 25 CFR Part 11.

Affirmed.

1. Bureau of Indian Affairs: Generally--Indians: Law and Order

Only reservations listed in 25 CFR 11.1(a) are governed by the law and order provisions codified in secs. 11.1 through 11.87 of 25 CFR Part 11. Because the Blackfeet Reservation is not listed thereunder, the Blackfeet Tribe may remove a tribal judge from its tribal court without regard to the procedural requirements found at 25 CFR 11.4.

2. Bureau of Indian Affairs: Generally--Indians: Law and Order

The fact that judges of the Blackfeet Tribal Court, which is not a CFR court, are financed in part by Federal funds, does not render such judges subject to the law and order regulations found at 25 CFR 11.1(d) and 25 CFR 11.4. The Blackfeet Tribe has its own ordinance governing the removal of judges, which has been approved by the Secretary, and such ordinance is exclusively controlling in such matters.

APPEARANCES: James W. Zion, Esq., for appellant, Lenore Salois; Ross W. Cannon, Esq., for appellee, Blackfeet Tribe.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

Lenore Salois, through counsel, has appealed from a decision rendered March 21, 1980, by the Area Director, Billings Area Office, Bureau of Indian Affairs (BIA), in which it was held that the BIA lacks authority to review an action by the Business Council of the Blackfeet Tribe dismissing appellant from her position as Chief Judge of the Blackfeet Tribal Court. The Area Director's decision was appealed to the Commissioner of Indian Affairs. By memorandum dated October 7, 1980, Acting Deputy Commissioner Theodore C. Krenzke referred the appeal to the Board of Indian Appeals for resolution pursuant to the provisions of 25 CFR 2.19(b). 1/

In the case at bar, counsel for appellant and the Blackfeet Tribe rely on submissions previously filed with the Commissioner of Indian Affairs. No brief has been filed on behalf of the BIA.

Background

Based on briefs of the parties and other matters of record, there is no dispute as to the following occurrences.

On June 7, 1979, the Business Council of the Blackfeet Tribe adopted Resolution No. 151-79 dismissing Lenore Salois as Chief Judge of the Blackfeet Tribal Court "effective immediately" but allowing her "a full hearing before the Blackfeet Tribal Business Council to consider the dismissal." On June 12, 1979, the Business Council adopted Resolution No. 159-79 rescinding Resolution No. 151-79 on grounds that the "Chief Judge is entitled by virtue of the provisions of the Blackfeet Law and Order Code to notice and hearing prior to dismissal." On June 12, 1979, the Business Council also adopted Resolution No. 160-79 placing Lenore Salois on administrative leave from all official duties as Chief Judge of the Blackfeet Tribal Court "up to and including the 22nd day of June 1979, or until the day of the hearing on the matter of her suspension or dismissal."

1/ The referral provisions of 25 CFR 2.19 are as follows:

"(a) Within 30 days after all time for pleadings (including extensions granted) has expired, the Commissioner of Indian Affairs shall:

"(1) Render a written decision on the appeal or

"(2) Refer the appeal to the Board of Indian Appeals for decision.

"(b) If no action is taken by the Commissioner within the 30-day time limit, the Board of Indian Appeals shall review and render the final decision."

The tribal hearing scheduled for June 22, 1979, was continued by the Business Council until July 2, 1979. Counsel for Lenore Salois filed a formal reply to the charges against her on June 27, 1979. Among other things, the reply objected to discharge proceedings being conducted by the Business Council of the Blackfeet Tribe on grounds that Section IV.C of the Plan of Operations for the Blackfeet Law Enforcement Program, adopted by the Business Council on December 13, 1974, vests initial jurisdiction over disciplinary proceedings of the type herein involved in the tribe's Law Enforcement Commission.

Following a hearing held July 2, 1979, by the Blackfeet Business Council, the council passed Resolution No. 168-79 on July 3, 1979, terminating Lenore Salois from her position as Chief Judge of the Blackfeet Tribal Court "effective immediately." 2/

On November 8, 1979, M. A. Fairbanks, Superintendent of the Blackfeet Agency, issued a statement to the Chairman of the Blackfeet Business Council approving the dismissal action on behalf of the Commissioner of the Indian Affairs, pursuant to the authority delegated to the Superintendent by 10 BIAM 7.2, section 2.50. The foregoing manual provisions provide that agency superintendents are vested with authority over the "appointment, suspension and removal for cause of judges of Courts of Indian offenses, pursuant to the provisions of

2/ Resolution No. 168-79, dated July 3, 1979, reads as follows:

"WHEREAS, The Blackfeet Tribal Business Council gave timely notice to Lenore Salois and her Attorney, James Zion, Helena, Montana, of hearings to be conducted before the Blackfeet Law & Order Commission and the Blackfeet Tribal Business Council on July 2, 1979, relative to disciplinary proceedings, and

"WHEREAS, the Blackfeet Law & Order Commission on July 2, 1979 at 10 o'clock A.M., by Motion, referred the entire matter of the disciplinary hearings concerning Lenore Salois to the Blackfeet Tribal Business Council, and

"WHEREAS, The Blackfeet Tribal Business Council conducted a full hearing on July 2, 1979, beginning approximately 10:30 and continuing until approximately 11:30 P.M. on that date, and

"WHEREAS, It appears from the evidence introduced at that hearing that there is substantial evidence to support the charges for the dismissal of Lenore Salois as Chief Tribal Judge of the Blackfeet Tribal Court, and

"WHEREAS, The Blackfeet Tribal Business Council after due deliberation on July 2, 1979, voted to dismiss Lenore Salois as Chief Judge, now

"THEREFORE BE IT RESOLVED AS FOLLOWS:

"That Lenore Salois is hereby dismissed from her position as Chief Judge of the Blackfeet Tribal Court effective immediately."

25 CFR Part 11, and of judges of Tribal Courts as provided by any law and order code." Counsel for Lenore Salois, Mr. Zion, was not served a copy of the Superintendent's notice of approval until November 27, 1979. On said date the Superintendent advised Mr. Zion that he could appeal the approval action to the Area Director, Billings Area Office, pursuant to the provisions of 25 CFR Part 2. Such an appeal was subsequently filed.

On appeal to the Area Director, appellant contended, among other things, that the provisions of 25 CFR 11.4, which pertain to proceedings for the removal of Judges from Courts of Indian Offenses, commonly known as "CFR Courts," are made applicable to the Blackfeet Tribal Court, which is not a "CFR" court, by virtue of 25 CFR 11.1(d).

The foregoing regulations provide:

§ 11.1 Application of regulations.

* * * * *

(d) The regulations in this part shall continue to apply to tribes organized under the act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 461-479), until a law and order code has been adopted by the tribe in accordance with its constitution and by-laws and has become effective; and thereafter §§ * * * 11.4 * * * shall continue in effect as long as the Indian judges and Indian police are paid from appropriations made by the United States or until otherwise directed.

* * * * *

§ 11.4 Removal of judges.

Any judge of the Court of Indian Offenses may be suspended, dismissed or removed, by the Commissioner of Indian Affairs, for cause, upon the recommendation of the tribal council.

Appellant presented evidence to show that some funding of the Blackfeet Tribal Court occurs through a contract with the BIA.

On March 21, 1980, the Area Director issued a decision denying appellant's appeal. The substantive rulings of the Area Director are quoted below:

We do not agree that regulations under 25 CFR Part 11.4 and 11.1(d) are applicable in this matter. Part 11.1(a) of 25 CFR contains a listing of Indian Reservations to which the regulations under parts 11.1 through 11.87H apply. The Blackfeet Reservation is not in that listing.

Furthermore the Blackfeet Tribal Court Judges are paid by tribal means, therefore the reference to payment under 25 CFR Part 11.1(d) does not apply in this case. It is true that a certain portion of the Blackfeet Tribal Court funding does come to the Tribe through a contract with the Bureau of Indian Affairs. However, we do not consider the language under 25 CFR Part 11.1(d) to be binding in reference to those funds.

A timely appeal from the Area Director's decision was filed by appellant with the Commissioner of Indian Affairs, which, as previously stated, has been referred to the Board by the Commissioner's Office for resolution.

Discussion, Findings, and Conclusions

Based on our review of the administrative record and applicable Federal law, we hold that the Area Director's decision must be affirmed.

[1] The Area Director's ruling that the regulations found at 25 CFR 11.1(d) and 11.4, among others, apply only to the reservations listed in 25 CFR 11.1(a) is supported by the clear and unambiguous language of the foregoing regulation. Under the heading "application of regulations," 25 CFR 11.1(a) (1980) states: "Except as otherwise provided in this part, 11.1-11.87H of this part apply to the following Indian reservations." Thereafter, a listing is given of 29 Indian reservations. The Blackfeet Reservation, as noted by the Area Director, is not included in such listing.

The regulatory history of 25 CFR Part 11 corroborates that only those reservations identified in 25 CFR 11.1(a) are envisioned by the Bureau of Indian Affairs as affected by the law and order regulations of Part 11.

On February 9, 1978, the Assistant Secretary for Indian Affairs proposed rules in the Federal Register which, for the first time, would inform the public as to which reservations the provisions of 25 CFR Part 11 specifically apply. See 43 FR 5528 (1978). In justifying this action, the Assistant Secretary stated:

It is proposed to include in 25 CFR 11.1(a) a complete list of all CFR courts (also known as Court of Indian Offenses). These are the Indian courts that derive the core of their substantive law from 25 CFR Part 11. All other Indian courts derive their substantive law from tribal codes or customs. The purpose of this amendment is to inform the public which reservations are governed by these regulations. [Emphasis added.]

The above-proposed rulemaking was published as a final rule of the Department on October 26, 1978. 43 FR 49981 (1978). The BIA amends the list of reservations identified in section 11.1(a) as situations require. See, for example, 44 FR 37502 (1979).

[2] Assuming, *arguendo*, that an Indian reservation need not be identified in 25 CFR 11.1(a) for other sections of Part 11 to apply to such reservation, there are other compelling reasons in this case why sections 11.1(d) and 11.4 of 25 CFR have no application to the removal of a tribal court judge on the Blackfeet Reservation, irrespective of whether Indian judges on the reservation are paid by Federal funds.

In accordance with its inherent right of self-government, the Blackfeet Tribe has adopted ordinances concerning the creation of the Blackfeet Tribal Court, and such ordinances govern the appointment, duties and termination of judges who sit on the Court. Chapter I, section 3 of the Law and Order Code of 1967 provides: "After notice and hearing, any judge of the Court may be suspended, dismissed or removed by the law and order committee and Tribal Business Council, with the approval of the Commissioner of Indian Affairs."

It is clear that the Blackfeet Tribe has adopted an ordinance pertaining to matters such as the removal of Judge Salois from office. By regulation, the Department has recognized that it is inappropriate for the law and order provisions of 25 CFR Part 11 to apply in such situations. At 25 CFR 11.1(e), it is stated:

(e) Nothing in this section shall prevent the adoption by the tribal council of ordinances applicable to the individual tribe, and after such ordinances have been approved by the Secretary of the Interior they shall be controlling, and the regulations of this part which may be inconsistent therewith shall no longer be applicable to that tribe.

The Blackfeet tribal ordinance governing the appointment and termination of tribal court judges has been approved by the Secretary and it has been in effect on the Blackfeet Reservation since 1967. Pursuant to the provisions of 11.1(e), the foregoing tribal ordinance is exclusively controlling in the matter of appellant's dismissal. The provisions of 11.1(d), which would indicate that since Blackfeet tribal judges are paid by Federal funds, no dismissal may be effected unless accomplished by the Commissioner of Indian Affairs for cause pursuant to section 11.4, are expressly inapplicable inasmuch as such provisions are inconsistent with section 11.1(e) and Blackfeet tribal law approved by the Secretary.

We agree with the position taken by the tribe in this appeal that the case at hand is similar to an issue addressed in Conroy v. Frizzell, 429 F. Supp. 918 (D.S.D. 1977), *aff'd*, 575 F.2d 175 8th Cir. 1978). In Conroy, the defendant contended that Part 11 of 25 CFR applied and invalidated the appointment of a judge to the Oglala Sioux Tribal Court for the reason that the judge appointed was not a member of the tribe, in violation of 25 CFR 11.3(d). Referring to provisions

of the Oglala Sioux Tribal Code and regulatory provisions identical to those presently found at 25 CFR 11.1(e), the court stated:

In the Constitution and By-Laws of the Oglala Sioux Tribe, the Tribal Council is empowered to establish reservation courts, and define the duties and powers of those courts * * *. The Oglala Sioux Tribal Council has enacted provisions of its Code which set up qualifications for Oglala Sioux Tribal Judges * * *. These provisions of the Code were approved by the Superintendent of the Pine Ridge Agency of the Bureau of Indian Affairs.

Under 25 U.S.C. § 1a, approval by the Agency Superintendent is tantamount to approval by the Secretary of the Interior. The judicial qualifications so enacted by the Oglala Sioux Tribal Council do not include a requirement that a tribal judge be a member of the tribe. Thus to that extent the duly enacted and approved tribal ordinance is inconsistent with Subchapter B Part 11 of Title 25 Code of Federal Regulations. Consequently, the tribal ordinance controls by virtue of 25 CFR § 11.1(3) * * *. [Quoting present provisions of 25 CFR 11.1(e), supra.]

We hold that the Blackfeet Tribal Code controls the procedure for the removal of judges to the Blackfeet Tribal Court to the exclusion of the regulations in Part 11 of 25 CFR. Although tribal law calls for approval by the Commissioner of Indian Affairs of removal actions taken by the Blackfeet Tribe, this approval power has been delegated by the Commissioner to the agency superintendent. Further, there is no basis for assuming that the superintendent's approval authority in such matters is equivalent to the Commissioner's authority set forth in 25 CFR 11.4 which permits the Commissioner to dismiss judges for cause upon the recommendation of tribal councils. Appellant's contention that under authority of section 11.4 the BIA should hold hearings concerning her removal is unfounded. A hearing regarding appellant's rights has been held by the Blackfeet Tribe and a tribal decision thereon has been rendered. The agency superintendent's approval of the action on behalf of the Commissioner was duly accomplished and no jurisdictional or legal basis exists for the reversal of that approval.

The Area Director's decision of March 21, 1980, is affirmed. This decision is final for the Department.

Wm. Philip Horton
Chief Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge